Coleman filed an EEOC charge against Crescent and the Board of Commissioners and a separate charge against NOBRA based on age discrimination. The EEOC issued a cause determination of age discrimination in Coleman's favor in both cases. Coleman filed a suit against Crescent and the Board of Commissioners and a separate suit against NOBRA based on age discrimination. Both cases were set before the same trial judge. The trial court dismissed both cases on summary judgment, finding that the ADEA was inapplicable because Crescent and NOBRA were not employers and that the Board of Commissioners was not a joint employer. App. 22-41. The Fifth Circuit affirmed the dismissal, App. 1.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY ERRONEOUSLY FINDING THAT THE ADEA DOES NOT APPLY TO CRESCENT BECAUSE IT IS NOT AN "EMPLOYER."

The Fifth Circuit erred in finding that the ADEA's prohibition against age discrimination is inapplicable to respondent, Crescent because it is not an "employer." The ADEA is clearly applicable to Crescent. The Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 623 provides that it "is unlawful for an employer to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ". Likewise "it is unlawful for an employment agency to fail or refuse to

refer for employment, or otherwise discriminate against, any individual because of such individual's age, or to *classify or refer for employment any individual on the* basis of such individual's age." Id. Labor organizations, such as unions, are prohibited from discriminating based on age as well. The ADEA provides that it is unlawful for a labor organization:

> to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age; (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

29 U.S.C. § 623(c).

Additionally, 29 C.F.R. § 1625.21 provides in pertinent part, "**All apprenticeship programs**, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of Section IV of the Age Discrimination Employment Act of 1967, as amended, 29 U.S.C. § 623." 29 C.F.R. § 1625.21. Here, the EEOC specifically-referred to defendant's violation of 29 C.F.R. § 1625.21 in finding that cause exists to believe that plaintiff was discriminated against because of his age.

The EEOC explained:

> [T]he EEOC Compliance Manual provides in pertinent part that "a[n] applicant to, or a participant in, training or apprenticeship program is protected against discrimination with respect to admission to, or participation in, the training or apprenticeship program, regardless of whether the individual is an 'employee.' **Discrimination against a participant in an apprenticeship or training program that is required prior to employment, or that commonly leads to regular employment, also constitutes discrimination against an applicant for employment, and is prohibited** because it has the effect of discriminatorily denying someone an employment opportunity. [emphasis added]

Coleman was denied admission into the apprenticeship program operated by Crescent and the Board of Commissioners based on his age. The courts have allowed plaintiffs in similar circumstances to proceed against operators of apprenticeship programs for age discrimination. In *EEOC v. Joint Apprenticeship Committee*, 80 FEP Cases 1519, (2nd Cir. 1999), the plaintiff was denied entrance into a four-year electrician apprentice program because the program required apprentices to be between the ages of 19 and 22. The program was operated by the Joint Apprenticeship Committee, a committee of the Joint Industry Board of the Electrical Industry. Successful completion of the apprenticeship program entitled an individual to membership in the International Brotherhood of Electrical Workers, Local 3, a union. The Joint Apprenticeship Committee was not an employer, yet the ADEA was held to bar discrimination by the Joint Apprenticeship Committee based on age.

The Fifth Circuit here refused to follow *Joint Apprenticeship Committee*. Crescent and the Board of Commissioners have a relationship similar to the relationship of the local union and the JAC in the *Joint Apprenticeship Committee* case. In *Joint Apprenticeship Committee*, the only way for an individual to become an electrician was to go through the local union and the Joint Apprenticeship Committee. Here, the only way to work as a river pilot on Crescent, Inc.'s portion of the river is to go through the Crescent and the Board of Commissioners' apprenticeship program. Thus, Crescent can be sued under the ADEA just as the Joint Apprenticeship Committee was properly sued under the ADEA.

In the present case, the trial court erroneously found that Crescent is not an employer based on *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). However, the Fifth Circuit focused incorrectly on the *Clackamas* standard for determining whether an officer or a shareholder is an employee and should have applied the common law test adopted and summarized by this Court in *Nationwide Mutual Insurance Company, v. Darden*, 503 U.S. 316 (1992). The *Darden* Court held:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are: the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method

> of payment; the hiring party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is a business; the provision of employee benefits; and the tax treatment of the hired party. *Id.*, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989).

A consideration of the *Darden* factors clearly shows that Crescent is an employer under the ADEA. Crescent controls the hiring/election process as was recognized by one of the Fifth Circuit panel members during oral argument. A pilot cannot work on the Crescent stretch of the river unless he is a Crescent pilot. Crescent also has significant control over the pilot's work. Crescent has the right to discipline and ultimately expel, i.e., terminate members. If Crescent expels a pilot from the association, he cannot work as a pilot on the Crescent stretch of the river. Crescent's work rules are forty-seven pages long and contain scores of regulations regarding, scheduling shifts, pilot conduct, pilot pay, sick leave, discipline, fines and hundreds of details relating to how pilots do their jobs. The very first rule states that Crescent's

> Board of Directors shall have supervision over the conduct of the members of the Association. Whenever a member shall be found guilty of conduct unbecoming a pilot or shall do any act or thing which tends to bring discredit upon the Association, the Crescent Board of Directors shall have the power to try such offending pilot. . . .

The Crescent Board of Directors is empowered to investigate refusals of service by pilots. Section 9 of Rule 1 imposes a fine of $1000 a day for any pilot who unilaterally resigns, and thereafter refuses duty. Section 21 of

Rule 1 requires pilots to dress neatly, and requires that "hair should be neat and not below the collar. . . . Shoes and socks must be worn and should be clean, no thongs or sandals." The rules include more than 20 pages of regulations regarding scheduling, boarding ships, exiting ships, rest periods, shift rotation, etc. Rule 17 creates a "Captain of the Station", who "shall be responsible for the discipline and conduct of the pilots while on the station." If a pilot desires to go off duty, he is required to "notify **management** at least six hours in advance . . . " and can be recalled to duty at "any time the Board [of Directors of Crescent] deems it necessary." Clearly, Crescent exercises significant control over the pilots.

Additionally, the majority of the other common law factors support the conclusion that Crescent is an employer. The skill required to be a pilot does not require a finding that pilots are independent contractors. A river pilot's training involves riding on the river with another pilot and a one-year apprenticeship program that relies heavily on on-the-job type training. While it is true that no one supervises the pilots when they are at the helm, the occupation of piloting a ship is often performed by employees. Coleman himself is presently employed as an employee as a captain of a vessel. However, even if piloting is considered a skilled occupation, this fact does not contribute much to the analysis of whether the pilots are employees or independent contractors. Airline pilots, engineers, trial attorneys, and even doctors work as employees.

As to the source of instrumentalities and tools used, Crescent dictates which ship plaintiff is assigned to work. Also Crescent provides the dispatcher office used to dispatch the pilots to their assignments and the boats which transport the pilots to the ships. The location of the

work is clearly dictated by Crescent as it decides which boats the pilots will pilot.

The factor involving the duration of the relationship also points to employee status. Crescent pilots can only work for Crescent. As to whether Crescent can assign additional projects and can determine when and how long a pilot works, Crescent has control over the pilots' entire work schedule, can assign additional assignments and can determine when and how long the pilots work.

The factors involving whether the work is a regular part of the business of Crescent and whether Crescent is a business also points to employer/employee status. Supplying pilots to vessels is Crescent's only business. Further Crescent operates as a corporation. As to how the pilots are paid, the pilots are neither paid by the job or by time, thus this factor is inapplicable. However, Crescent does provide employee-type benefits, such as health insurance, vacation, sick leave and retirement benefits.

The last factor mentioned in *Darden* is the tax treatment of the hired party. Crescent issues a form 1099 to its pilots and does not do employee withholding. However, the fact that an employer does not perform withholding cannot insulate an employer from the anti-discrimination provisions of the ADEA and Title VII.

The most significant *Darden* factors mitigate in favor of finding that Crescent is the employer of the pilots. This is especially true where Crescent selects the pilots, disciplines the pilots and can refer them to the Board of Crescent Commissioners for decommissioning, thereby **preventing a pilot from ever working as a commissioned pilot on the Crescent stretch of the river**. Crescent should not be allowed to discriminate based on age by cloaking itself with

the appearance of being a non-profit association of independent contractors, especially given the fact that Crescent enjoys state-created monopoly status. Older workers, African-Americans and women cannot work as a river pilot on Crescent's stretch of the River unless they work for Crescent. If the Fifth Circuit's opinion is affirmed, there is no federally guaranteed right to equal opportunity for river pilots in Louisiana.

The Fifth Circuit and the trial court were erroneously impressed by the fact that once a pilot takes the helm of a vessel, neither Crescent, Inc. nor the Board, can exert control over the pilot. *Ehret v. State of Louisiana*, 862 F. Supp. 1546, 1550 citing, *McKeithen v. The SS FROSFA*, 441 F. Supp. 1213, 1220 (E.D. La. 1977). The courts' reliance on this factor is misplaced. The *McKeithen* case relied on *Guy v. Donald*, 27 S. Ct. 62, 64-65 (1906), wherein this Court refused to hold a Virginia pilot association vicariously liable for the negligence of a pilot in a shipping accident. The Court refused to find vicarious liability because it found that, under a Virginia statute, the pilot was the agent of the vessel's owner. Additionally, the Court relied on the fact that under general maritime law, the captain was the master of the ship and the association could not control the pilot once he was at the helm, *Guy*, 27 S. Ct. at 64-65. However, this principle was adopted so that a captain can make quick judgments in order to ensure the safety of the ship and has no relevance in determining whether Crescent is an employer in the context of discrimination law.

Crescent seeks to escape the United States' discrimination laws by claiming that the pilots are independent contractors hired by the shipping companies. However, the shipping companies contract with and pay Crescent for

pilots. Crescent assigns the pilots to the various ships without the shipping companies even knowing which pilot they are being assigned. How many independent contractors belong to an "association" that schedules their work, determines how much they are paid and have no freedom to work with another group? Clearly, the pilots are employees of Crescent, Inc., a state-created monopoly that employs pilots.

II. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY ERRONEOUSLY FINDING THAT THE BOARD OF COMMISSIONERS COULD NOT BE LIABLE AS A "JOINT EMPLOYER."

The Fifth Circuit held that the Board of Commissioners could not be held liable as a joint employer because it held that Crescent itself is not an employer. Once this Court reverses the Fifth Circuit's determination of Crescent's status, the case should also be remanded to determine whether the Board of Commissioners is a joint employer.

III. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY ERRONEOUSLY FINDING THAT THE ADEA DOES NOT APPLY TO NOBRA BECAUSE IT IS NOT AN "EMPLOYER."

The Fifth Circuit's opinion as to NOBRA is incorrect for the same reasons argued above relating to Crescent. Like Crescent, NOBRA has work rules, albeit shorter, which include fines and disciplinary rules similar to

Crescent's work rules. NOBRA "elects" pilots into the apprenticeship program which leads to their ultimate commissioning and hiring, provides for sick leave, retirement benefits and has the power to recommend a NOBRA pilot for decommissioning. In short, NOBRA is an employer, just as Crescent is.

CONCLUSION

This Court should grant certiorari and remand for trial on the merits. Otherwise, Coleman and others will be deprived of equal opportunity on the Mississippi River.

Respectfully submitted,

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437 F.3d 471

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30666

TERRY C. COLEMAN,

Plaintiff-Appellant,

versus

NEW ORLEANS AND BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION,

Defendant-Appellee.

No. 04-30700

TERRY C. COLEMAN,

Plaintiff-Appellant,

versus

CRESCENT RIVER PORT PILOTS ASSOCIATION, INC.,

Defendant-Appellee.

TERRY C. COLEMAN,

Plaintiff-Appellant,

versus

BOARD OF RIVER PORT PILOTS COMMISSIONERS,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed Jan. 24, 2006)

Before JONES, Chief Judge, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this age discrimination case, the question is whether the Mississippi River pilot associations are "employers" of the member pilots for the purposes of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* The question is difficult and yields no straightforward answer. The defendant associations are long-standing, peculiarly conducted institutions recognized by statute, owned and governed by their member pilots, and serving as a sort of clearinghouse and dispatching service for the river pilots. There is no doubt that if the plaintiff suffered age discrimination, it was administered by the hands of the defendant associations because of their age-restrictive policies. Yet, there is an absence of any traditional employer relationship, traditional independent-contractor relationship, hiring-hall relationship, or employment-agency relationship between the associations and the pilots.

Terry Coleman ("Coleman"), born October 1, 1951, brought suit against the New Orleans & Baton Rouge Steamship Pilots Association ("NOBRA") and the Crescent River Port Pilot's Association ("Crescent"), as well as the Board of River Port Pilot Commissioners (the "Crescent Board"), alleging that these entities unlawfully discriminated against him on the basis of his age in violation of the ADEA. They did so, he claims, by refusing to elect him

into their respective pilot apprenticeship programs because he was too old under their membership qualifications. The District Court granted summary judgment in these separately filed actions to NOBRA, Crescent, and the Crescent Board, holding that these entities are not "employers" within the meaning of the ADEA and therefore cannot be held liable under the ADEA. Because both cases present similar legal issues, we consider them together in this opinion.

We hold that NOBRA, Crescent, and the Crescent Board are not "employers" of river pilots within the meaning of the ADEA. These entities are therefore not subject to the ADEA's prohibitions on age discrimination in employment. Accordingly, we AFFIRM the District Court's grants of summary judgment to NOBRA, Crescent, and the Crescent Board.

I

In our effort to determine whether any of the defendants meet the definition of "employer" under the ADEA, we must first understand Louisiana's body of rules and regulations governing the licensing of Mississippi River pilots and the relationship among pilots, boards of examiners, and pilots' associations in the operation of the pilot apprenticeship programs. Only then can we fully understand the organizational structure of the defendant pilots' associations and its bearing on the question of liability under the ADEA.

A

Louisiana state law requires that local pilots guide foreign ships along Louisiana waterways, including the

Mississippi River. The Louisiana portion of the Mississippi River is divided into three zones. *See generally Hendrix v. Louisiana Public Service Commission*, 263 So.2d 343, 345 (1972). "Bar pilots" or "associated branch pilots" guide vessels in and out of the entrance of the Mississippi River between Pilottown and the Gulf of Mexico.[1] LA. REV. STAT. § 34:941, *et seq.* "River port pilots" guide vessels between Pilottown and New Orleans. LA. REV. STAT. § 34:991, *et seq.* "New Orleans and Baton Rouge Steamship Pilots" guide seagoing vessels from the port of New Orleans to the port of Baton Rouge and intermediate ports. LA. REV. STAT. § 34:1041, *et seq.* An individual who wishes to serve as a pilot in any of these zones must receive a commission from the Governor of Louisiana entitling him to work as a pilot on a particular stretch of the river. Receiving a commission is a multi-step process.

Regulation of the process of applying to be a pilot is mainly the responsibility of the state regulatory boards created for this specific purpose. The Board of River Port Pilot Commissioners ("Crescent Board") is authorized by statute to "hold examinations under such rules and regulations, and with such requirements as they shall have provided," to certify to the Governor that applicants are qualified to be river port pilots. LA. REV. STAT. § 34:991, 993. The Board of Examiners for the New Orleans and Baton Rouge Steamship Pilots ("NOBRA Board") is similarly authorized to certify qualified applicants to the Governor to be New Orleans and Baton Rouge Steamship Pilots. LA. REV. STAT. § 34:1042, 1045. Each of these boards is comprised of three citizens holding commissions

[1] Bar pilots and their association are not at issue in this case.

for the appropriate stretch of the river. LA. REV. STAT. § 34:991, 1042. The Governor appoints individuals to serve on the commissions. *Id.*

An individual must first petition the appropriate board for a determination of his qualifications.[2] A few specific requirements for qualified pilots are set out by statute. Before the Crescent Board may certify the candidate to the Governor for commissioning, river port pilots are required to (1) be of good moral character, (2) be a voter of the state of Louisiana, and (3) have completed an approved apprenticeship program. LA. REV. STAT. § 34:993. New Orleans and Baton Rouge Steamship Pilots are required by statute to (1) be of good moral character, (2) be a voter of the state of Louisiana, (3) have a first class pilot license issued by the United States Coast Guard, and (4) complete a six-month apprenticeship. LA. REV. STAT. § 34:1045.

The Crescent Board and the NOBRA Board are authorized by statute to provide additional requirements for individuals seeking to become pilots. Among myriad licensing and educational requirements, the Crescent Board requires that the individual "must not have reached his *fortieth birthday* prior to the first day of balloting on apprentices by the river port pilots." LA. ADMIN. CODE tit. 46 § 3201(C) (2003) (emphasis added). The NOBRA Board requires that the individual "shall not have reached his or her *forty-fifth birthday* before being commissioned." LA. ADMIN. CODE tit. 46, § 6107 (2003) (emphasis added).

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[2] This exact process does not appear to be mandated by statute, but rather the result of the regulations promulgated by the boards of commissioners/examiners and the respective pilots' association for the particular stretch of the river.

An individual applying to be an apprentice first submits his application to the appropriate board of commissioners/examiners for certification that the individual is a qualified apprentice candidate. Because apprenticeships must be completed under the supervision of a commissioned pilot, and because only a limited number of pilots are allowed by law, certification by the board as a qualified candidate does not guarantee an individual a place in the apprenticeship program. The individual must then be elected to apprenticeship by a majority vote of the pilots' association for the respective stretch of the river.

Once elected, the candidate completes a board-certified apprenticeship program under the supervision of commissioned pilots. The boards retain the right to require satisfactory completion of the apprenticeship program, extend the apprenticeship, or terminate the apprenticeship when deemed necessary. LA. ADMIN. CODE tit. 46, § 6107(L) (2003). Upon completion of the apprenticeship program, the boards examine the apprentices as to their knowledge of pilotage and their proficiency and capability to serve as commissioned pilots. LA. ADMIN. CODE tit. 46, § 6107(M)(2) (2003). If the board deems the apprentice qualified, the board certifies the apprentice to the Governor for commissioning. The Governor may then appoint, in his discretion, the individual to an existing vacancy. LA. REV. STAT. §§ 34:993, 1045.

B

The pilots' associations that elect individuals to apprenticeships exist pursuant to Louisiana law giving pilots the right to "form themselves into an association or associations as to them may seem fit, not in conflict with

law. . . ." LA. REV. STAT. § 34:995; LA. REV. STAT. § 1047. Crescent and NOBRA periodically hold elections for apprenticeship when each respectively determines that a need exists for new pilots. The associations select only the number of apprenticeship candidates commensurate with the number of new pilots needed.[3]

Crescent and NOBRA are incorporated under the laws of Louisiana as non-profit corporations. LA. REV. STAT. § 12:201 *et seq.* Crescent's Charter provides that the objects and purposes of the corporation are, in relevant part:

> To provide efficient means for dispatching Crescent River Port Pilots to ships and vessels assigned and requiring the services of such pilots on an equitable basis, providing for the collection and disbursement of fees and charges of whatsoever nature and kind incident to the performance of such services, and making distribution thereof among the shareholders of this corporation after

[3] The NOBRA Board's regulations provide that an applicant "must have been duly elected an apprentice in the New Orleans and Baton Rouge Steamship Pilots Association as per Association rules in effect as of such application." LA. ADMIN. CODE tit. 46, § 6107 (2003). The legal source of this voting process for the Crescent Board and Crescent is unclear. We have found nothing in the law requiring only so many individuals be apprenticed as there are open seats, although this does make practical sense. Similarly, we have found nothing in the law requiring that the association elect apprentices by majority vote, although the fact that, as a practical matter, all pilots are association members makes this process sensible and efficient. What is clear, however, is that this process is long-standing and a matter of tradition for the pilots. *See generally Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans*, 25 So.2d 527, 755-58 (1946), *aff'd* 330 U.S. 552 (1947).

> deducting all legitimate and approved expenses of the operation of same.
>
> To provide for a pension and welfare plan for retired shareholders of this corporation, and for their families.
>
> * * *
>
> To inculcate, secure and maintain skill, discipline, merit and efficiency in the pilots engaged in piloting vessels over the pilotage waters assigned to the Crescent River Port Pilots, promoting and assisting the commerce and prosperity of the Port of New Orleans.

NOBRA's Charter similarly provides, albeit with much less specificity, that the purpose of the association is

> To carry on the business of piloting sea-going and other vessels on the Mississippi River, between the Mississippi River Ports of New Orleans and Baton Rouge and return, for fees, and to shift vessels in the harbors of Harahan, Avondale, St. Rose, Destrehan, Good Hope, Norco, Reserve, Burnside, Gramercy and other harbors to and including Baton Rouge, Louisiana, in accordance with Act 291 of the Legislature of 1942 of the State of Louisiana (Louisiana Revised Statutes 34:1041, et sequitur); and to inculcate, secure and maintain skill, discipline, merit and efficiency in the pilots engaged in this business, and to thereby promote and assist the commerce and prosperity of said ports and intermediate ports.

Each association is owned by its members; each member pilot holds one share of the association's stock.

The primary business of both associations is to receive requests for pilotage from ship agents and dispatch pilots

to those vessels. The associations also collect the fees from the shipping companies for the pilotage work performed. The receipts, minus general overhead expenses, are remitted monthly to member pilots in accordance with an established formula based on the number of days each individual was available for piloting. The associations do not withhold tax or FICA on the monies distributed to pilot members, and pilots' pay is reflected on IRS Form 1099, rather than IRS Form W-2.

Membership in an association is not required by law, but most, if not all, pilots currently commissioned in the NOBRA and Crescent stretches of the river are members of the appropriate association.

II

A

Despite the complexity of the interrelationships and the working arrangements among the associations and the pilots, the facts underlying Coleman's claims are simple. Coleman, born on October 6, 1951, is an experienced ship captain who sought to become a commissioned pilot on the NOBRA and Crescent stretches of the Mississippi River.

Coleman submitted an application for the apprenticeship program to the NOBRA Board in 1996. NOBRA held an election for apprentices in 2001, but Coleman's name did not appear on the ballot as a certified candidate for apprenticeship. At the time of the NOBRA election, Coleman was forty-nine years old. NOBRA requires that an applicant "not [have] reached his forty-fifth (45th) birth date."

Coleman also submitted an application for the apprenticeship program to the Crescent Board in 1999. Crescent held an election that same year, but Coleman's name did not appear on the ballot as a certified candidate for apprenticeship. At the time of the Crescent election, Coleman was forty-seven years old.[4] Crescent's Charter requires that an applicant "shall not have reached his fortieth birthday prior to the day of the first ballot for his election as an apprentice."

B

After filing an EEOC charge against NOBRA and receiving a right-to-sue letter, Coleman filed an action against NOBRA alleging that the association unlawfully discriminated against him on the basis of his age in violation of the ADEA by failing to elect him into the river pilot apprenticeship program. NOBRA moved for summary judgment asserting that it is not an "employer" under the ADEA. The District Court granted NOBRA summary judgment, finding that Coleman did not present a genuine issue of material fact with respect to whether NOBRA is an "employer" of river pilots within the meaning of the ADEA. *Coleman v. New Orleans Baton Rouge Steamship Pilots Association*, 2004 WL 1237447 (E.D. La. June 1, 2004). The District Court summarily adopted the reasoning

[4] Additional facts are alleged by Coleman and the defendants. These facts, however, are not relevant to the question whether these entities are "employers", but rather are relevant only to the establishment of a *prima facie* case of age discrimination and the subsequent *McDonnell Douglas* analysis. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 349-53 (5th Cir. 2005). The District Court did not address whether Coleman established a *prima facie* case of age discrimination.

of *Ehret v. State of Louisiana*, 862 F.Supp. 1546 (E.D. La. 1992), a case holding that Crescent lacked control over its member pilots and therefore was not their employer. *Ehret*, in turn, had found persuasive the analysis in the tort case *McKeithen v. The SS FROSTA*, 441 F.Supp. 1213 (E.D.La.1977), which held that NOBRA was not vicariously liable as an employer because it exerted no control over a pilot once he took the helm of a vessel. *McKeithen* likened NOBRA to other professional associations and found NOBRA pilots to be independent contractors.

Coleman also received right-to-sue letters from the EEOC for his charges against Crescent and the Crescent Board. Coleman then filed separate actions alleging violations of the ADEA against Crescent and the Crescent Board, which were consolidated before the District Court. Crescent and the Crescent Board both moved for summary judgment arguing in part that they are not "employers" or "joint employers." Relying on the same reasoning as the opinion in the NOBRA proceeding, the District Court granted Crescent and the Crescent Board summary judgment. *Coleman v. Crescent River Port Pilot's Association, Inc.*, 2004 WL 1278005 (E.D. La. June 8, 2004).

Coleman now appeals both judgments.[5] Thus, we have before us the two appeals presenting mutually dispositive issues.

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[5] Coleman also appeals the District Court's denial of his motions for reconsideration of the summary judgment motions, or in the alternative new trial. We do not discuss these issues on appeal because Coleman's argument is underdeveloped, simply arguing that his motions should have been granted to correct the manifest injustice of the District Court's error in granting summary judgment to defendants.

III

We review a grant of summary judgment *de novo,* using the same standard applied by the District Court. *Hall v. Gillman, Inc.*, 81 F.3d 35, 36 (5th Cir. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

A

(1)

A primary purpose of the ADEA is to prohibit arbitrary age discrimination in employment. 29 U.S.C. § 621(b). To accomplish this purpose, the ADEA prohibits certain practices by employers, employment agencies, and labor organizations. 29 U.S.C. § 623(a)-(c). In relevant part, the ADEA makes it unlawful for an employer

> to otherwise fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

29 U.S.C. § 623(a)(1). An employment agency may not

> fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

29 U.S.C. § 623(b). Finally, it is unlawful for a labor organization

> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

29 U.S.C. § 623(c). Although the prohibitions of the ADEA are broad in scope, the reach of the ADEA is limited by the statute's own definitions of "employer," "employment agency," and "labor organization." *See* 29 U.S.C. § 630. If an entity is not an employer, employment agency, or labor organization, it is not subject to the prohibitions of the ADEA against age discrimination in employment.

The question that confronts us is whether Crescent[6] and NOBRA are entities that are subject to the prohibitions of the ADEA. The answer to this question is not

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[6] Coleman does not assert that the Crescent Board is an employer standing alone, but rather that the Crescent Board is only subject to the ADEA as a joint employer with Crescent.

immediately apparent. We begin by considering each possibility of coverage under the ADEA.

(2)

We first observe that NOBRA and Crescent cannot be considered "employment agencies" or "labor organizations" under the ADEA. Coleman has not made such an assertion, but at first glance, NOBRA and Crescent share characteristics with employment agencies and labor organizations as they are commonly understood. The dispatching function of the associations, matching pilots with vessels needing piloting, may be analogized in a general way to the usual purpose of an employment agency or union hiring hall. However, we must deal specifically with the definitions in the ADEA. NOBRA and Crescent are not labor organizations because they do not exist for the "purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment. . . ." 29 U.S.C. § 630(d). Although the ADEA refers to hiring halls, its reference is only to explain that a labor organization is "deemed to be in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer. . . ." 29 U.S.C. § 630(e).

Moreover, labor organizations interact with the *employer* of the members of the organization. A shipowner or charterer is not the hired pilot's employer in the sense relevant here, for it exercises no control over the pilot's navigation of the vessel. We can find no argument or authority for deeming pilots anything other than independent

contractors of the vessels they are hired to navigate. Thus, this term "employer" prevents our finding that NOBRA and Crescent are employment agencies, which are defined as "any person regularly undertaking with or without compensation to procure employees for an *employer* and includes an agent of such person. . . ." 29 U.S.C. § 630(c) (emphasis added).

Despite the functional similarities between the associations and labor organizations/employment agencies, because of the ADEA definitions of the two types of entities, we are left to consider only whether NOBRA and Crescent are *employers* of their member pilots. The ADEA defines an "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ." 29 U.S.C. § 630(b). This definition, however, provides little guidance in determining whether a particular entity is in fact an employer; the statute simply defines "employee" as "an individual employed by any employer. . . ." 29 U.S.C. § 630(f).[7]

The circular language defining "employer" at least states clearly that an entity must employ twenty or more employees to satisfy the ADEA definition of employer. Whether Crescent or NOBRA has more than twenty employees depends entirely on whether the pilots are

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[7] The terms "employer" and "employee" have been identically treated under the ADEA and Title VII. Thus, cases interpreting the terms under either statute may be considered in determining whether the defendants are employers for the purposes of the ADEA. *See Fields v. Hallsville Indep. School Dist.*, 906 F.2d 1017, 1020 n.7 (5th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

considered to be employees of the associations. We are thus left with the sole question whether the pilots are the associations' employees, a term not substantively defined by the statute.[8]

(3)

We have come all this way to arrive at the point suggested by the previous cases and indeed by the District Court: the touchstone of our analysis centers around the

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[8] As noted above, the District Court relied on *Ehret*'s multi-factor right-to-control analysis to hold that the pilots are not employees of the associations. Coleman asserts that *Ehret* is no longer controlling law because the post-*Ehret* promulgation of 29 C.F.R. § 1625.21 clarified that NOBRA and Crescent are employers at least with respect to the apprenticeship program. Coleman notes that the EEOC specifically referred to 29 C.F.R. § 1625.21 in finding that cause existed to believe that Coleman was discriminated against because of his age. Coleman also notes that courts have allowed plaintiffs to proceed against operators of similar apprenticeship programs for violations of the ADEA. *See EEOC v. Joint Apprenticeship Committee,* 186 F.3d 110 (2d Cir. 1999).

We think Coleman misreads the scope of 29 C.F.R. § 1625.21. We agree with the District Court that the regulation "expands the coverage of the ADEA to applicants for apprenticeship programs, but does not expand the classes of persons liable pursuant to the ADEA as set forth in 29 U.S.C. § 623." *Coleman v. New Orleans Baton Rouge Steamship Pilots Ass'n,* 2004 WL 1237447, at *3 (E.D. La. June 1, 2004). Section 1625.21 did not alter 29 C.F.R. § 1625.1, which provides that "the terms person, employer, employment agency, labor organization, and employee shall have the meanings set forth in § 11 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.* . . ." The regulation itself makes clear that it does not expand liability beyond "employers" by specifically referencing the "prohibitions of Section IV of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623." The Second Circuit's decision in *Joint Apprenticeship Committee* is not to the contrary because it simply assumed that an employer-employee relationship existed. 186 F.3d at 115.

common-law notion of control of the individual. Our approach to the question of control takes a somewhat different path, however. In *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), the Supreme Court approved the EEOC's gloss on the control standard in questioning whether a partner, officer, major shareholder, or director qualifies as an employee. Given the relationship between the pilots and the associations, which we have earlier described in detail, we find such an analysis specifically appropriate. The EEOC framed the issue as "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.* at 448 (internal citation omitted). The Court specifically embraced the EEOC's proposed six factors relevant to determining whether a shareholder/director is an employee of the organization:

(1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work

(2) Whether, and if so, to what extent the organization supervises the individual's work

(3) Whether the individual reports to someone higher in the organization

(4) Whether, and if so, to what extent the individual is able to influence the organization

(5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

(6) Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50. We now apply these Supreme Court/EEOC factors to the pilots' relationship to the defendant associations.

The first factor we consider is whether the pilots' associations hire and fire the member pilots. Despite Coleman's arguments to the contrary, they do not. Certainly, the pilots' associations do have the power to elect apprentices and to admit pilots into their membership. The associations, however, do not have the power to grant commissions that permit the pilot to work in the profession; pilots receive their commissions from the Governor, and the associations cannot decommission a pilot. With respect to the actual job performed – piloting – the role of the associations is essentially that of dispatching pilots to the ships needing them; the vessel engages the pilot and the master of the vessel can refuse the services of a particular pilot. This first factor weighs against labeling the pilots ADEA employees.

The second and third factors ask whether the pilots' associations supervise the individual pilot's work and whether the pilot reports to someone "higher" in the association. As noted earlier, the primary business of the associations is to receive requests for pilotage, dispatch pilots to the vessels, and collect and disburse pilotage fees. The associations do not supervise the pilots in their work, nor is there a chain of command in the performance of their work – the individual pilot gives navigation advice independently according to his own professional judgment. These two factors therefore weigh against labeling the pilots ADEA employees.

The fourth factor asks to what extent the pilots are able to influence the pilots' associations. Pilots constitute

the entire body of shareholders of their respective associations. Each pilot holds an equal share and participates in the election of directors of the association and in shareholder-approval votes. Thus, the pilots exert substantial influence over the general management of the association as well as the promulgation of association rules and regulations specifically. This factor, too, weighs against labeling the pilots ADEA employees.

The fifth factor asks whether the parties intended that the individual pilot be an employee. Clearly not. Each of the charters of NOBRA and Crescent makes unequivocal that no employment relationship is intended; these charters expressly define the relationship between the pilots and the association as an association for the mutual benefit of the member pilots. This factor also weighs against labeling the pilots ADEA employees.

The sixth factor asks whether the pilots share in the profits, losses, and liabilities of the association. Pilots share in the "profits" of the association (and the "losses" if times are not good) by receiving a share of collected fees according to a set formula agreed upon by the shareholder pilots themselves. At the same time, the associations have no *respondeat superior* liability for the conduct of the pilots, which emphasizes the lack of control over the work of the pilot. Consistent with the fact that pilots act independently according to their own professional judgment in piloting a vessel, pilots remain personally liable for their own negligence. *See McKeithen, supra.* Further, the associations' charters specifically state that the associations are not responsible for debts or faults of their members. This factor also weighs against labeling the pilots ADEA employees.

We conclude that the EEOC's six factors, though not *necessarily exhaustive, are decisive here. Each factor* weighs against finding that the pilot is an employee of the association. The associations obviously are the most important and determinative factor in the work life of a pilot; yet the elements of employer control over an employee fail to describe the character of the power that the associations exercise. It is certainly true that the associations, along with the NOBRA and Crescent Boards and the governor, play an almost monopolistic gate-keeper role in determining who will ultimately work as a river pilot; it is also true that the associations (through their members) set rules and regulations directly affecting the daily work of each pilot. Nevertheless, if *Clackamas* is our guide, the central characteristics of employer control over the pilot are lacking. The associations do not hire or fire pilots, nor can they decommission them; they do not supervise the pilots in their work; and their charters create relationships that cannot be characterized as employee/employer. The pilots do their work independently according to their own professional judgment; they have ultimate control over the associations' rules and regulations that bind them; and they retain personal liability for their own negligence, with no vicarious liability attaching to the associations. Until the United States Supreme Court adopts a wholly different analytical approach from the one provided by *Clackamas,* we think it clear that the pilots are not employees of the associations. It follows that neither of the associations, with fewer than twenty employees, is an employer within the definition of the ADEA.

Accordingly, we hold that the District Court did not err in granting NOBRA and Crescent summary judgment.

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Coleman does not assert that the Crescent Board itself is an "employer." *See Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570 (1st Cir. 2004). Instead, Coleman argues that the Crescent Board is a joint employer with Crescent. Because we hold that Crescent is not an employer of pilots under the ADEA, it follows that the Crescent Board cannot be a joint employer with Crescent. Accordingly, we hold that the District Court did not err in granting summary judgment to the Crescent Board because it is not an employer under the meaning of the ADEA.

IV

Based on the foregoing considerations, which are, of necessity, narrowly bound to the unique qualities of the pilots' associations presented here, the District Court's grants of summary judgment are

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY C. COLEMAN	**CIVIL ACTION**
VERSUS	**No. 02-3366**
NEW ORLEANS BATON ROUGE STEAMSHIP PILOTS ASSOCIATION	**SECTION: I/2**

ORDER AND REASONS

(Filed Jul. 9, 2004)

On June 1, 2004, this Court entered an order granting a motion for summary judgment filed on behalf of defendant, New Orleans Baton Rouge Steamship Pilots Association ("NOBRA").[1] On June 2, 2004, this Court entered a judgment in favor of NOBRA and against plaintiff, dismissing plaintiff's claims with prejudice.[2] This matter is now before the Court pursuant to a motion, filed on behalf of plaintiff, Terry C. Coleman, for reconsideration or, alternatively, for a new trial.[3] NOBRA opposes the motion.

LAW AND ANALYSIS

The Federal Rules of Civil Procedure do not expressly recognize motions for reconsideration. *See Bass v. United States Dep't of Agriculture,* 211 F.3d 959, 962 (5th Cir. 2000). When a party moves a court to reconsider its grant of summary judgment, the motion will be recharacterized as a motion to alter or amend the judgment pursuant to

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[1] Rec. Doc. No. 54.

[2] Rec. Doc. No. 56.

[3] Rec. Doc. No. 58.

Fed. R. Civ. P. 59(e) and analyzed accordingly. *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997); *Laverspere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 175 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994).[4]

The governing principles pursuant to which a Rule 59(e) motion is determined were succinctly set forth by the Fifth Circuit in *Templet v. HydroChem Inc.*, 367 F.3d 473, (5th Cir. 2004):

> A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir.2002). This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990). Rather, Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989) (internal quotations omitted). Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. *Clancy v. Employers Health Ins. Co.*, 101 F.Supp.2d 463, 465 (E.D.La.2000) (citing 11

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[4] Plaintiff has styled his motion in the alternative as a motion for a new trial. "[Plaintiff's] motion is a peculiar one to say the least. As no trial was held in the district court, it cannot logically be called a motion for new trial." *St. Paul Mercury Ins. Co.*, 123 F.3d at 339. (construing a motion for a new trial after a grant of summary judgment as a request for reconsideration of summary judgment and treating the motion as Rule 59(e) motion to alter or amend a judgment).

> CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, Federal Practice & Procedure § 2810.1, at 124 (2d ed.1995)).
>
> In *Lavespere [v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5th Cir.1990)], his Court recognized that while a district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration, such discretion is not limitless. 910 F.2d at 174. This Court has identified two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts. *Id.* (citations omitted). The task for the district court is to strike the proper balance between these competing interests. *Id.*

Id. at 478-79 (alteration supplied). Moreover, the Fifth Circuit has held that "an unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration." *Id.* at 479 (citing *Russ v. Int'l Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991)).

Plaintiff's motion for reconsideration does not demonstrate any manifest error of law or fact in this Court's judgment. Instead, plaintiff's motion for reconsideration is simply a restatement of the arguments and evidence presented to and considered by this Court with respect to NOBRA's motion for summary judgment. Additionally, although plaintiff has attached deposition evidence to the motion for reconsideration that was not presented to this Court in opposition to the motion for summary judgment, plaintiff has not provided any justification for his failure to present such evidence in connection with the summary judgment motion. Plaintiff does not contend, nor could he

contend, that the deposition is "newly discovered" evidence. The deposition was taken on April 19, 2004,[5] well before NOBRA filed its motion for summary judgment on May 12, 2004.[6] Moreover, plaintiff makes no argument with respect to the relevance or importance of this deposition testimony.

Because the motion for reconsideration is supported by legal theories and arguments that have been considered by this Court and because those arguments are supported by references to evidence that either was, or could have been, considered by this Court prior to the entry of judgment, the Court concludes that the "judicial imperative" of finality outweighs the need for this Court to exercise its discretion and reopen this case in response plaintiff's Rule 59(e) motion.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff, Terry C. Coleman, for reconsideration be and hereby is **DENIED**.

New Orleans, Louisiana, July 8, 2004.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

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[5] Rec. Doc. No. 58, Ex. A., at 1.

[6] *See* Rec. Doc. No. 45. In any event, the deposition testimony submitted by plaintiff is merely cumulative of evidence submitted in plaintiff's opposition to NOBRA's summary judgment and has been submitted in support of an argument considered, and rejected, by this Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY C. COLEMAN	**CIVIL ACTION**
VERSUS	**No. 02-3366**
NEW ORLEANS BATON ROUGE STEAMSHIP PILOTS ASSOCIATION	**SECTION: I/2**

ORDER AND REASONS

(Filed Jun. 1, 2004)

This matter is before the Court pursuant to a motion, filed on behalf of defendant, New Orleans Baton Rouge Steamship Pilots Association ("NOBRA"), to dismiss or, alternatively, for summary judgment.[1]

Plaintiff, born October 6, 1951, filed this action alleging that NOBRA unlawfully discriminated against him on the basis of his age by failing to elect him into the river pilot apprenticeship program, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). The NOBRA charter prohibits anyone aged forty-five or older from becoming a member of NOBRA.[2] NOBRA moves for summary judgment asserting that NOBRA is not an "employer" and, therefore, is not subject to liability pursuant to the ADEA.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

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[1] Rec. Doc. No. 45.

[2] *See* Rec. Doc. No. 47, Ex. 8, at 12.

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party carries its burden pursuant to Rule 56(c), the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). That burden is not satisfied by creating merely some metaphysical doubt as to the material facts, by conclusory allegations, unsubstantiated assertions or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted).

The ADEA prohibits an "employer," "employment agency," or "labor organization" from discriminating against individuals on the basis of their age.[3] *See* 29 U.S.C. § 623(a)-(c). With respect to "employers," the Act provides:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

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[3] Although plaintiff cites to 29 U.S.C. § 623(c) which prohibits age discrimination by "labor organizations," plaintiff neither alleged in his complaint that NOBRA is a labor organization nor does he advance any such argument in opposition to the instant motion. Additionally, plaintiff does not argue that NOBRA is an "employment agency" within the meaning of the ADEA. Accordingly, this Court addresses only the threshold issue of whether NOBRA is an "employer."

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C.A. § 623(a). 29 C.F.R. § 1625.21 provides in pertinent part:

> All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623.

The Fifth Circuit has set forth a two-step process for determining whether a defendant is an "employer" pursuant to the ADEA:

> First, the defendant must fall within the statutory definition. Second, there must be an employment relationship between the plaintiff and the defendant. *See generally, Fields v. Hallsville Indep. Sch. Dist.,* 906 F.2d 1017, 1019 (5th Cir.1990), *cert. denied,* 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991).

Deal v. State Farm County Mut. Ins. Co. of Texas, 5 F.3d 117, 118 (5th Cir. 1993). The Act defines an "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b).

Plaintiff argues that the river pilots are "employees" of NOBRA. It is undisputed that NOBRA has a membership of more than twenty pilots.[4] Additionally, the defendant's summary judgment evidence that NOBRA has less than twenty employees absent the inclusion of the river pilots is unrebutted. Therefore, plaintiff's claim turns on whether an employment relationship exists between NOBRA and the river pilots.

The issue of whether a statutorily authorized Louisiana river pilot association is an "employer" within the meaning of the ADEA was addressed in *Ehret v. State of Louisiana,* 862 F.Supp. 1546 (E.D.La. 1992). In that case, plaintiff sued the Crescent River Port Pilot's Association (the "Association") and the Board of River Port Pilot Commissioners for the Port of Orleans alleging that the Association's rule limiting entry into the Association's apprenticeship program to individuals who had not passed their fortieth birthday violated the ADEA. *Id.* at 1548. Applying the Fifth Circuit's hybrid "economic realities/common law control" test for determining whether an employment relationship exists,[5] the court held that the

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[4] Plaintiff has cited no case in which river pilots were hold to be "employees"

[5] The "economic realities/common law control" test is set forth in *Fields v. Hallsville Indep. Sch. Dist.,* 906 F.2d 1017 (5th Cir. 1990). Pursuant to that test, "the right to control an employee's conduct is the most important factor.'" *Id.* at 1019 (citation omitted). "[I]f an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist." *Id.* (internal quotation and citation omitted). Other relevant factors include:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or

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Crescent River Port Pilot's Association was not an "employer" of the river pilots within the meaning of the ADEA. *Ehret,* 862 F.Supp. at 1549-51.[6] The Court concluded:

> The ADEA does not prevent all age discrimination against those who work for a living. Whatever the merits of the age restriction included in the river port pilot apprenticeship program, the Court finds that the Board and the Association are not employers covered by the ADEA. . . .

Id. at 1552; *see also Camacho v. Puerto Rico Ports Authority,* ___ F.3d ___, 2004 WL 1143719, at *4-6 (1st Cir. May 21, 2004) (applying a common law agency test and holding that the Puerto Rico Ports Authority is not a de facto employer of harbor pilots for purposes of liability pursuant to the ADEA notwithstanding some control over the harbor pilot's day-to-day activities) (citing *Ehret*).

> is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; *i.e.,* by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Fields, 906 F.2d at 1020 n.4.

[6] In *Ehret,* the court also held that the Board of Commissioner's was not an "employer," nor were the Association and the Board "joint employers." *Ehret,* 862 F.Supp. at 1551-52.

Plaintiff argues that the analysis in *Ehret* is no longer sound because 29 C.F.R. § 1625.21, enacted subsequent to *Ehret,* expands the coverage of the ADEA to apprenticeship programs. In the present case, the EEOC, relying solely upon 29 C.F.R. § 1625.21, determined that the rules of NOBRA and the Board of Examiners for New Orleans and Baton Rouge Steamship Pilots, which prohibit any person forty-five or more years of age from becoming a river pilot, discriminate on the basis of age and constitute a class-wide violation of the ADEA.[7] Quoting the EEOC Compliance Manual, the EEOC stated, "[d]iscrimination against a participant in an apprenticeship or training program that is required prior to employment, or that commonly leads to regular employment, also constitutes discrimination against an applicant for employment, and is prohibited because it has the effect of discriminatorily denying someone an employment opportunity."[8]

Although the Court agrees with the EEOC that 29 C.F.R. § 1625.21 expands the coverage of the ADEA to applicants for apprenticeship programs, the regulation does not expand the classes of persons liable pursuant to the ADEA as set forth in 29 U.S.C. § 623. To the contrary, the regulation explicitly provides that "[a]ll apprenticeship programs . . . *are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623.*" (emphasis supplied). In turn, 29 U.S.C. § 623 prohibits an employer, employment agency, or labor organization from discriminating based upon age. *See* § 623(a)-(c). Finding that plaintiff was an applicant to

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[7] *See* Rec. Doc. No. 47, Ex. 7., EEOC determination letter, at 2.

[8] *Id.*

an apprenticeship program, the EEOC failed to address whether, as a threshold issue, NOBRA was an "employer" subject to liability pursuant to the Act. Plaintiff has offered no support for the proposition that the regulation expands the definitions of persons and entities Congress identified as potentially liable pursuant to the ADEA. The Court finds that *Ehret's* holding that a Louisiana pilot association, organized pursuant to the Louisiana statutory scheme governing compulsory river pilots, is not an "employer" of river pilots is unaffected by the enactment of 29 C.F.R. § 1625.21.[9]

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[9] Albeit in other contexts, courts have stated that a river pilot association is not an employer and that river pilots are independent contractors. For example, in *McKeithen v. S.S. Frosta,* 441 F.Supp. 1213, the court held that NOBRA was not the employer of river pilots for purposes of assessing its tort duty to third persons. *Id.* at 1216. The Court noted:

> The pilots association is a voluntarily formed non-profit corporation. The formation of the association is permitted by L.S.A.-R.S. 34:1047, which provides for self-regulation not in conflict with law or the rules and regulations of the Board of Commissioners. The association maintains a central office where it receives requests for pilotage. It maintains a roster of pilots available for duty and dispatches them to vessels on a rotating basis. It collects the pilots' fees, pays general overhead expenses from these receipts and remits the remaining receipts on a monthly basis to the individual member pilots according to an established formula based on the number of days each individual was available for piloting vessels. The association does not take out withholding tax or FICA on monies distributed to the pilot members because they are self-employed. The association files an annual federal income tax return on a corporate form (Form 1099), but does not pay taxes as an entity. [*See Mobile Bar Pilots Assoc. v. C I R.,* 97 F.2d 695 (5th Cir. 1938)]. It does not accrue profits of its own from the pilots' work.

Id. at 1216 (E.D. La. 1977). Based on the above facts, which exist in the instant case, the court held that "[t]his association is not the employer

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Upon consideration of the motion, the opposition, the law, and the summary judgment evidence submitted by the parties, the Court finds the reasoning set forth in *Ehret* is persuasive and applicable to this case.[10] Further, the Court finds that plaintiff's summary judgment evidence is insufficient to raise a genuine issue of material fact with respect to whether NOBRA is an "employer" within the meaning of the ADEA. Accordingly, NOBRA cannot be held liable pursuant to the ADEA. Although the Court expresses grave doubts as to the wisdom or logic behind NOBRA's age restriction, this Court is bound by the specific statutory classes of persons and entities enumerated by Congress to which the ADEA applies.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of defendant, New Orleans Baton Rouge Steamship Pilots Association, for summary judgment is **GRANTED** and plaintiff's claim is hereby **DISMISSED**.

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of the pilots nor is it a partnership of pilots." *Id; see also Blancq v. Hapag-Lloyd A.G.*, 968 F.Supp. 376, 381 & n.6 (E.D.La. 1997) (noting that a river pilot is "typically considered an independent contractor" and citing cases).

[10] NOBRA operates similarly to the Crescent River Port Pilots Association, *See Id.* at 1550 n.6 (noting the similarity). Plaintiff in the instant case has not brought a claim against the Board of Examiners for New Orleans and Baton Rouge Steamship Pilots in this litigation. Although plaintiff contends that NOBRA exercises influence with respect to who the Board certifies for election to the apprenticeship program, it is undisputed that the final decision with respect to who is certified to be included in the apprenticeship election lies with the Board.

New Orleans, Louisiana, May 31, 2004.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY C. COLEMAN	**CIVIL ACTION**
VERSUS	**No. 02-2775 c/w 02-3247**
CRESCENT RIVER PORT PILOTS ASSOCIATION, INC.	**SECTION: 1/2**

ORDER AND REASONS

(Filed Jul. 23, 2004)

On June 7, 2004, this Court entered an order granting motions for summary judgment filed in these consolidated actions on behalf of defendants, Crescent River Port Pilots Association, Inc. and the Board of River Port Pilot Commissioners.[1] On that same date, this Court entered a judgment in favor of defendants and against plaintiff, dismissing plaintiff's claims with prejudice.[2] This matter is now before the Court pursuant to a motion, filed on behalf of plaintiff, Terry C. Coleman, for reconsideration or, alternatively, for a new trial.[3] Defendants oppose the motion.

LAW AND ANALYSIS

The Federal Rules of Civil Procedure do not expressly recognize motions for reconsideration. *See Bass v. United*

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[1] *Coleman v. Crescent River Port Pilots Association, Inc.*, Civil Action 02-2775, Rec. Doc. 58; *Coleman v. Board of River Port Pilots Commissioners*, Civil Action 02-3247, Rec. Doc. No. 7.

[2] *Crescent River Port Pilots Association*, Rec. Doc. No. 59; *Board of River Port Pilots Commissioners*, Rec. Doc. No. 8.

[3] *Crescent River Port Pilots Association*, Rec. Doc. No. 60.

States Dept of Agriculture, 211 F.3d 959, 962 (5th Cir. 2000). When a party moves a court to reconsider its grant of summary judgment, the motion will be recharacterized as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) and analyzed accordingly. *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997); *Laverspere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 175 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994).[4]

The governing principles pursuant to which a Rule 59(e) motion is determined were succinctly set forth by the Fifth Circuit in *Templet v. HydroChem Inc.*, 367 F.3d 473, (5th Cir. 2004):

> A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transients Gas Corp.*, 303 F.3d 571, 581 (5th Cir.2002). This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990), Rather, Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence," *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989) (internal quotations omitted),

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[4] Plaintiff has styled his motion in the alternative as a motion for a new trial. "[Plaintiff's] motion is a peculiar one to say the least. As no trial was held in the district court, it cannot logically be called a motion for new trial." *St. Paul Mercury Ins. Co.*, 123 F.3d at 339, (construing a motion for a new trial after a grant of summary judgment as a request for reconsideration of summary judgment and treating the motion as Rule 59(c) motion to alter or amend a judgment).?? [1] Rec. Doc. Nos.

> Reconsideration of a judgment after its entry is an extraordinary remedy that should he used sparingly. *Clancy v. Employers Health Ins. Co.*, 101 F.Supp.2d 463, 465 (E.D.La.2000) (citing 11 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, Federal Practice & Procedure § 2810.1, at 124 (2d ed.1995)),
>
> In *Lavespere* [*v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5th Cir.1990)], this Court recognized that while a district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration, such discretion is not limitless, 910 F.2d at 174. This Court has identified two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts. *Id.* (citations omitted). The task for the district court is to strike the proper balance between these competing interests. *Id.*

Id. at 478-79 (alteration supplied). Moreover, the Fifth Circuit has held that "an unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration." *Id.* at 479 (citing *Russ v. Int'l Paper Co.*, 943 F.2d 589, 593 (5th Cir.1991)).

Plaintiff's motion for reconsideration does not demonstrate any manifest error of law or fact in this Court's judgment. Instead, plaintiffs motion for reconsideration is simply a restatement of the arguments and evidence presented to and considered by this Court with respect to defendants' motions for summary judgment. Additionally, although plaintiff has attached additional documentary evidence, specifically, Crescent's "Work Rules," to the

motion for reconsideration which was not presented to this Court in opposition to the motion for summary judgment, plaintiff has not provided any justification for his failure to present such evidence in connection with the summary judgment motion. Plaintiff does not contend that the Work Rules are "newly discovered" evidence.

Because the motion for reconsideration is supported by legal theories and arguments that have been considered by this Court and because those arguments are supported by references to evidence that either was, or could have been, considered by this Court prior to the entry of judgment, the Court concludes that the "judicial imperative" of finality outweighs the need for this Court to exercise its discretion and reopen this case in response plaintiff's Rule 59(e) motion.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff, Terry C. Coleman, for reconsideration be and hereby is **DENIED**.

New Orleans, Louisiana, July 22, 2004.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY C. COLEMAN	**CIVIL ACTION**
VERSUS	**No. 02-2775 c/w 02-3247**
CRESCENT RIVER PORT PILOTS ASSOCIATION, INC.	**SECTION: 1/2**

ORDER AND REASONS

(Filed Jun. 7, 2004)

Before the Court in these consolidated cases are motions for summary judgment, filed on behalf of defendants, Crescent River Port Pilots Association, Inc. and the Board of River Port Pilot Commissioners.[1]

Plaintiff, born October 6, 1951, filed these consolidated actions alleging that defendants unlawfully discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), Defendants now move for summary judgment asserting that they are not "employers" or "joint employers" and, therefore, they are not subject to liability pursuant to the ADEA.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving

[1] Rec. Doc. Nos. 35, 36.

party carries its burden pursuant to Rule 56(c), the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). That burden is not satisfied by creating merely some metaphysical doubt as to the material facts, by conclusory allegations, unsubstantiated assertions or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted).

Upon consideration of the motions, the opposition, the summary judgment evidence, and the law, for the reasons assigned in *Ehret v. State of Louisiana*, 862 F.Supp. 1546 (E.D.La. 1992), and this Court's opinion in *Coleman v. New Orleans Baton Rouge Steamship Pilots Association*, Civil Action 02-3366, Order and Reasons, Rec. Doc. No. 54 (E.D.La. June 1, 2004), the Court finds that there is no genuine issue of material fact with respect to whether the Crescent River Port Pilots Association, Inc. or the Board of River Port Pilot Commissioners is an "employer" or "joint employer" subject to liability pursuant to the ADEA. Therefore, defendants are entitled to a judgment as a matter of law.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motions of defendants, Crescent River Port Pilots Association, Inc. and the Board of River Port Pilot Commissioners, for summary judgment are **GRANTED** and plaintiff's claims in these consolidated actions are hereby **DISMISSED**.

New Orleans, Louisiana, June 7, 2004.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

FILED
MAY 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1347

In The
Supreme Court of the United States

TERRY C. COLEMAN,

Petitioner,

v.

NEW ORLEANS and BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION, CRESCENT RIVER PORT PILOTS' ASSOCIATION, and BOARD OF RIVER PORT PILOT COMMISSIONERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

There are three primary and several secondary issues presented in the Petition. The lower courts resolved the first primary issue in favor of defendants, rendering the remaining issues moot.

I. Is the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, which is the sole basis for petitioner's claims, applicable to the Crescent River Port Pilots' Association and/or the Board of River Port Pilot Commissioners?

   a. Are commissioned River Port Pilots "employees" (as that term is defined by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*) of the Crescent River Port Pilots' Association and/or the Board of River Port Pilot Commissioners; or, as held by the lower courts, are commissioned River Port Pilots "independent contractors?"

   b. Does 29 C.F.R. § 1625.21 expand the scope of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* beyond the context of an employee/employer relationship?

II. Did petitioner make out a *prima facie* case of discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*?

   a. Was petitioner qualified to be a candidate for River Port Pilot apprentice under the regulations duly promulgated by the Board of River Port Pilot Commissioners, despite his:

      1. lack of appropriate United States Coast Guard licensure; and

QUESTIONS PRESENTED – Continued

2. prior felony convictions for possession with intent to distribute narcotics?

b. Was there a duty on the part of the Crescent River Port Pilots' Association and/or the Board of River Port Pilot Commissioners to assist petitioner in obtaining the United States Coast Guard licensure he needed in order to be qualified as a candidate for River Port Pilot apprentice?

III. Since petitioner was not deemed qualified as a candidate for River Port Pilot apprentice by the Board of River Port Pilot Commissioners and, thus, did not appear on the ballot from which the members of the Crescent River Port Pilots' Association selected apprentices, was there any discrimination in fact against petitioner by the Crescent River Port Pilots' Association?

CORPORATE DISCLOSURE

Respondent Cresent River Port Pilots' Association is a non-profit Louisiana corporation. There are no parent corporations or publicly held companies owning 10% or more of Respondent's stock.

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STATEMENT OF THE CASE

Terry Coleman (Coleman), a two-time convicted drug felon without the appropriate licenses from the United States Coast Guard (USCG), attempted to become a river port pilot. He sued the Crescent River Port Pilots' Association (Association) and the Board of River Port Pilot Commissioners (Board)[1] under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* because he was not selected by the Association's members as an apprentice. The district court granted Defendants' summary judgment motions on the basis that neither defendant is an employer within the meaning of the ADEA because of a lack of an employer-employee relationship and, thus, cannot be held liable under the ADEA. The district court denied Coleman's request for reconsideration. The United States Court of Appeals for the Fifth Circuit (Fifth Circuit) affirmed.[2]

Coleman's "Statement of the Case" has almost nothing to do with the undisputed material facts upon which the summary judgment was granted or on which it was affirmed. Rather, those "facts" are predominantly ***irrelevant and disputed allegations*** (if not outright inappropriate and unsubstantiated character assassination). The material, undisputed facts are:

1. In 1985, Coleman was convicted in the United States District Court for the Eastern District of Louisiana of possession with intent to distribute cocaine.

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[1] Coleman's separate suit against the Board was removed and consolidated with his suit against the Association.

[2] 437 F.3d 471 (5th Cir. 2006).

2. In 1986, Coleman was convicted in the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, of possession with intent to distribute marijuana.

3. On or about February 29, 1999, Coleman submitted a petition to the Board seeking to become a commissioned river port pilot.

4. Coleman did not at any time pertinent hereto hold the appropriate USCG First Class Pilot License (USCG License) of steam or motor vessel of any gross tons for any of the following four waterways: (a) Mississippi River from Southport Mile 104.7 to the Head of Passes Mile 0.0; (b) The Inner Harbor Navigation Canal (Industrial Canal) from the Mississippi River to Lake Pontchartrain; (c) The Intracoastal Waterway (ICW) from the intersection of the Industrial Canal and the ICW to and including Michoud Canal, or; (d) The Mississippi River Gulf Outlet, from the intersection of the ICW to Mile 28.3, the present location of Beacon #78 (collectively, the USCG Licenses).

5. The USCG requires as a condition and/or prerequisite for taking the test to obtain each of the USCG Licenses, a certain amount of experience in the wheelhouse of vessels traversing the particular waterway to which the license applies. The USCG does not require that this experience be obtained in the presence of a commissioned river port pilot. This experience can be obtained in a variety of ways without the assistance of a commissioned river port pilot.

6. The Board is charged with the duty of establishing the qualifications of river port pilots and providing for the examination and approval of apprenticeship programs for river port pilots.